STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B158

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BENITO PACHECO,

Complainant,

VS.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Hearing in this matter was held on July 22, 1997, in Denver before Administrative Law Judge Margot W. Jones. Respondent appeared at hearing through Celina Benavidez and was represented by Steven A. Chavez, Assistant Attorney General. Complainant, Benito Pacheco, was present at the hearing and represented by Elizabeth Salkind, attorney for the Colorado Federation of Public Employees.

Respondent called Complainant to testify at hearing and called as witnesses at hearing Celina Benavidez, the Colorado Department of Transportation Director of Human Resources and Administration, and George Wilkerson, Highway Maintenance Supervisor II.

Complainant testified in his own behalf and called no other witnesses.

The parties stipulated to the admission into evidence of Respondent's exhibits 1 through 8, 14, and 15 through 23.

MATTER APPEALED

Complainant appealed the imposition of a five day disciplinary suspension.

ISSUES

The parties raise the following issues to be considered at hearing:

1. whether Complainant engaged in the conduct for which discipline was imposed;

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- 2. whether the conduct proven to have occurred constitutes violation of State Personnel Board rules; and
- 3. whether the decision to imposed a five day disciplinary suspension was arbitrary, capricious, or contrary to rule or law.

PRELIMINARY MATTERS

- 1. In the Prehearing Statement, Complainant seeks entry of an order finding that a June, 1997, performance appraisal rating was not justified. Respondent moved to strike this claim. It was argued that the Board is without authority to consider this claim for relief because Complainant failed to grieve the June, 1997, performance rating in a timely manner and therefore cannot challenge it in this appeal. Respondent's motion to strike was granted. The Board is without authority to review a performance rating which was not timely grieved and not appealed to the Board.
- 2. Respondent moved to limit the evidence considered at hearing to the issue whether the decision to impose the five day disciplinary suspension was the imposition of discipline within the range available to a reasonable and prudent administrator. Respondent contended that Complainant pled quilty to the charge of disorderly conduct in Alamosa County Court on April 8, 1997. Respondent contends that the allegations upon which the charge of disorderly conduct were premised are the same as those which form the basis of the disciplinary action herein. Respondent maintained that based on the theory of estoppel by judgment Complainant is precluded from presenting evidence at hearing pertaining to the underlying allegations in this matter. Respondent argued that the motion in limine should be granted limiting the evidence to be presented at hearing to the issue of the propriety of the discipline imposed.

Respondent further contends that the parties stipulated to the admission into evidence of exhibits pertaining to three prior corrective actions imposed on Complainant. Respondent argues that under State Personnel Board Policy 8-3(A), the appointing authority was required to impose disciplinary action following the imposition of two corrective actions within a twelve month period.

Respondent's motion in limine was granted with regard to the theory of estoppel by judgment and with regard to the issue of the disciplinary action imposed here. At hearing, however, Respondent inquired of its witnesses about the underlying incident which gives rise to the discipline imposed. Thus, Complainant was permitted to present evidence responding to the agency's case. For purposes of

this case, the ALJ considered all the evidence presented by the parties, making findings with regard to the underlying facts proven at hearing.

FINDINGS OF FACT

- 1. Complainant, Benito Pacheco (Pacheco), is employed by the Colorado Department of Transportation. At the time relevant to this appeal, in March, 1997, Pacheco was employed as a snowplow driver. Pacheco's immediate supervisor is George Wilkerson. The appointing authority for Pacheco's position is Celina Benavidez (Benavidez).
- 2. On March 25, 1997, Pacheco was operating a snowplow in Alamosa, CO. In the course of performing his duties, he got snow and ice on a vehicle operated by Dwayne Paxton (Paxton), a private citizen.
- 3. Paxton came to the Colorado Department of Transportation office in Alamosa to complain about Pacheco's actions. Paxton lodged his complaint with George Wilkerson, Pacheco's supervisor. George Wilkerson asked Pacheco to join him in his office with Paxton and his wife in order to respond to the citzen's complaints.
- 4. In George Wilkerson's office, an argument ensued between Dwayne Paxton and Pacheco. Their voices were raised and Pacheco was pointing at Paxton in an aggressive way attempting to make his point. Paxton rose from his seat and Pacheco continued to point at Paxton hitting Paxton with his hand.
- 5. Paxton advised Wilkerson that he wanted to file charges against Pacheco as a result of the incident on the highway and as a result of their argument in the office during which Paxton maintained he was struck by Pacheco.
- 6. Wilkerson directed Paxton to a law enforcement office in the building where he could lodge his complaint. Pacheco was charged with failing to yield the right of way when proceeding from a stop sign. He was also charged with harassment, a violation of the criminal code of the Colorado Revised Statutes.
- 7. Pacheco paid a fine resulting from the citation for failure to yield the right of way. On April 8, 1997, the charge of harrassment was reduced to disorderly conduct and Pacheco pled guilty to the charge. He received a deferred sentence.
- 8. As a result of Pacheco's conduct on March 25, 1997, during his conversation with Paxton in George Wilkerson's office, Benavidez

decided to meet with Pacheco for a Board Rule, R8-3-3 meeting. Pacheco met with Benavidez on May 29, 1997. At the R8-3-3 meeting, Pacheco explained that he should have "knocked out" Paxton. Pacheco during his explanation of the altercation with Paxton clearly presented himself to Benavidez as the aggressor in the March 25, 1997, incident.

- 9. Benavidez decided that Pacheco's March 25, 1997, conduct was inappropriate. Benavidez determined that Pacheco's actions raising his voice to the citizen and acting in an aggressive manner, including inappropriately touching the citizen with his hand was contrary to the agency's policy on workplace violence. Benavidez further considered the fact that during the R8-3-3 meeting Pacheco failed to understand that his conduct was inappropriate. She reached this conclusion because Pacheco advised her that he should have "knocked out" the citizen. Benavidez concluded that Pacheco's conduct on March 25, 1997, constituted a failure to comply with standards of efficient service.
- 10. Benavidez reviewed Pacheco's employment record. She determined that since he received three prior corrective actions under Board Policy 8-3(A), she was required to impose disciplinary action. She concluded that the imposition of a five day disciplinary suspension was warranted in this instance.

DISCUSSION

Certified state employees have a protected property interest in their employment. The burden is on Respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously, or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Respondent contends that it established by preponderant evidence that Complainant engaged in the conduct for which discipline was imposed and that the decision to impose a five day disciplinary

suspension was neither arbitrary, capricious, nor contrary to rule or law.

Complainant contends that he was not the aggressor on March 25, 1997, during the conversation with Paxton in George Wilkerson's office. He further contends that he was unaware of anything that happened on the highway which would have precipitated Paxton's complaint in the first place. Complainant argues that in light of the conduct proven to have occurred the imposition of the five day suspension was too severe.

The evidence amply supports the conclusion that Complainant engaged in the conduct for which discipline was imposed. Complainant conducted himself in an unprofessional and aggressive manner with Paxton on March 25, 1997. In light of the conduct proven to have occurred, and the fact that Complainant received three prior corrective actions during the preceding twelve month period, it was neither arbitrary, capricious, nor contrary to rule or law for the appointing authority to imposed a five day disciplinary suspension.

CONCLUSIONS OF LAW

- 1. Respondent established by preponderant evidence that Complainant engaged in the conduct for which discipline was imposed.
- 2. Respondent established that the conduct proven to have occurred constituted a failure to comply with standards of efficient service.
- 3. The decision to impose a five day disciplinary suspension was neither arbitrary, capricious, nor contrary to rule or law.

ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

DATED this ____ day of July, 1997, at Denver, Colorado.

Margot W. Jones Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and

mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of July, 1997, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Elizabeth Salkind, LLC Attorney at Law 1580 Logan St., Suite 310 Denver, CO 80203

and to the respondent's representative in the interagency mail, addressed as follows:

Steven A. Chavez
Department of Law
1525 Sherman St., 5th Floor
Denver, CO 80203